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Written statement* submitted by the International Movement Against All Forms of Discrimination and Racism (IMADR), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[23 August 2018]

* Issued as received, in the language(s) of submission only.

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Arbitrary Detention in Sri Lanka**

IMADR welcomes the country visit to Sri Lanka undertaken by the UN Working Group on Arbitrary Detention (UNWGAD) from 4th to 15th December 2017. In this regard, we submit this written statement to share concerns and recommendations on the issue of arbitrary detention in Sri Lanka.

We welcome the following recent progress undertaken by the Government of Sri Lanka (GoSL) related to the prevention of arbitrary detention and the prosecution of those responsible:

- Accession to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) on the 5th of December 2017, which entered into force on the 4th of January 2018;
- Appointment on the 14th of July 2016 of a Committee to Eradicate Torture by the Police;
- Adoption of the Right to Information Act of 2017;
- Strengthening of the Human Rights Commission's ability to access various places of deprivation of liberty, even unannounced, and free from interference from the authorities. As well as its 18th of May 2016 Directive on Arrest and Detention under the Prevention of Terrorism Act (PTA). Additionally, the President's decision on the 17th of June 2017, instructing the Commanders of the Armed Forces and the Police to comply with the said Directive; and
- Adoption of the National Action Plan for the Protection and Promotion of Human Rights (NAPPPHR) 2017-2021.

Despite the abovementioned progress in abolishing arbitrary detention, the Sri Lankan legal system continues to fall short in meeting international human rights standards and best practices. Challenges to prevent arbitrary detention in Sri Lanka persist as well as the suffering of those unjustly detained.

Legal and institutional challenges

First and foremost, the progress mentioned formerly is to be considered jointly with its own noticeable limitations. While the recent accession to the OP-CAT is encouraging, the designation of the existing Human Rights Commission of Sri Lanka (HRCSL) as the future National Preventive Mechanism (NPM) needs careful considerations. The HRCSL is currently facing a lack of financial and human resources thus impairing its capacity, hence general concerns over the performance of the future NPM. Furthermore, in spite of its clear mandate to review and advise legislators for ensuring human rights oriented legislative process, the HRCSL is rarely consulted by authorities in the drafting of new legislations.

Alongside the above concerns, the fundamental legislative deficiency, allowing the majority of human rights abuses against detainees and suspects, is none but the PTA. This alarmingly broad and powerful law, drafted as the legislative weapon against terrorism, has been the main cause for arbitrary arrest and detention, and to this day remains as a source of deep angst for minorities fearing oppression.

The PTA grants exceptional powers to authorities, such as the right to arrest suspects for unspecified "unlawful activities". From this dreadful moment, the situation only deteriorates for detainees, with no legal assistance guaranteed before the beginning of court proceedings, and authorities can legally detain them for up to 18 months without attending a pre-trial court. Such practice has long been criticised by the civil society and UN human rights bodies, as it significantly violates the human rights of detainees.

As pointed out by the UNWGAD, the system of bail under the PTA is ineffective, as only the Attorney General can consent to the suspect's release on bail, which remains extremely rare and so exclude de facto the suspects from it, thus condemning them to remain in detention until the end of proceedings.

Regarding pre-trail detention for regular criminal matters, the situation is far from optimistic, with over half of the prison population still awaiting trial, often enduring years of pre-trial detention. Moreover, the length of investigations and proceedings is often amplified under the PTA, leading to suspects commonly being detained for a decade without a sentence. Such lengthy pre-trial imprisonment is indubitably incompatible with Sri Lanka's international obligations, particularly with article 9 of the International Covenant on Civil and Political Rights (ICCPR).

** *References can be available at: www.imadr.org

The time spent in detention prior to conviction is often not calculated in the final sentence, as it is up to the discretion of the judge. Such practice occurs both under the PTA and for regular criminal proceedings. Fearing years in arbitrary detention, many chose to plead guilty in order to expedite proceedings. Even some of the acquitted are treated with very little respect, sometimes not even acquiring acknowledgement of wrongful conviction from the State, nor compensation. Such unwarranted detention of extreme length, paired with denial of wrongdoing from the authorities, cannot be tolerated.

Confessions and statements under the PTA also involve a deeply dubious practice, as suspects' lawyers are not present, further contributing to the arbitrary application of the PTA. Many report the use of harassment, intimidation, threat, ill-treatment and torture to extract confession. Cases of confessions of Tamil speakers written in Sinhalese have also been reported, even though it was clear that the suspects did not understood the language.

One factor seems recurrent and highly aggravates concerns over the use of the PTA, which is the authorities' systematic targeting of minorities. At the time of its visit, the UNWGAD found an astounding number of suspects of Tamil origin in custody under the PTA. Such a staggering Tamil majority in the PTA prison population suggests an undeniable discriminatory use of this counter-terrorism legislation. Discrimination against Tamils is likewise performed through the transfer of their cases to predominantly Sinhalese speaking courts. The UNWGAD reported cases transferred from the Tamil speaking High Courts of Vavuniya and Trincomalee to Anuradhapura where only one Tamil translator was present for proceedings, a clear bitter impediment to a fair trial through the intentional establishment of language barriers. Adding to such discriminatory practices, no Tamil judges were seating at the Supreme Court of Colombo at the time.

However, one of the most notable goals of the NAPPPHR 2017-2021 is to be the repeal and replacement of the PTA, with a new legislation officially meant to comply with international standards and best practices. Regrettably, the proposed draft of the Counter Terrorism Act (CTA), if enacted, will merely bring progress towards the protection of human rights in countering terrorism. Indeed, if some safeguards are specifically inscribed, for ensuring the well-being of suspects, prolonged detention without charges will still be permitted, hence a remaining high risk of abuses. In its July 2017 country visit, the then UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted considerable risks arising from the terminology of the proposed CTA. The broad definition of terrorism is of great concerns and may very well lead to arbitrary use on non-terrorism cases and "against minorities or human rights defenders in a discriminatory and sectarian manner". Such a potential for dubious application of the law is intolerable in a society already ravaged by both institutional and direct discrimination against minorities.

Finally, Sri Lanka is not a party to the 1951 Refugee Convention, and although it enjoys arrangements with the Office of the UN High Commissioner for Refugees (UNHCR) through a memorandum of understanding ensuring the protection of asylum seekers, the ad-hoc nature of such a system remains of great concerns.

The steps undertaken by the Government are still insufficient which need crucial improvements. The Government has committed to the HRC Resolution 30/1 in September 2015, yet high potential for arbitrary detention and discrimination still remain anchored in the criminal justice system.

Recommendations

Against this backdrop, we recommend the Government of Sri Lanka, with meaningful consultation with civil society, to:

- Fulfil the promises laid out in the HRC Resolution 30/1;
- Ensure that the advice of the Human Rights Commission is sought on any future draft legislation, and guarantee independence and sufficient budget for both the Commission and the NPM to ensure their efficiency;
- Immediately investigate the alleged cases of torture, inhuman and degrading treatment in detention;
- Grant systematic legal counsel for all suspects in pre-trial, ensure that pre-trial detention remains exceptional, guarantee fair and equal access to bail for all criminal cases and bestow such decision to the judiciary, not the prosecutors, and decide on an individual basis;
- Take a pre-trial period into account for the calculation of the final sentences, acknowledge wrong-doings and offer due compensation in case of acquittal;
- Ratify the 1951 Refugee Convention and its 1967 Protocol and develop national legal framework in accordance with the Convention and international standards;

- Investigate allegations of discrimination against minorities in the criminal justice system and bring perpetrators to justice;
- Immediately repeal the PTA and guarantee the protection of human rights in its counter-terrorism measures in compliance with international standards and best practices;
- Accelerate the fulfilment of its criminal justice reform goals under the Nation Action Plan for the Protection and Promotion of Human Rights 2017-2021; and
- Implement the recommendations of the Working Group on Arbitrary Detention and relevant recommendations from other UN human rights mechanisms.